

ROYAL COURT

21st October, 1992

187.

Before the Judicial Greffier

<b>BETWEEN</b>	<b>Robertson Ward International Limited</b>	<b>ORIGINAL PLAINTIFF</b>
<b>AND</b>	<b>Richard John Hammon Paine and Alan William Potter trading as Robertson Ward Associates</b>	<b>PLAINTIFFS</b>
<b>AND</b>	<b>Diamond (Jersey) Limited</b>	<b>FIRST DEFENDANT</b>
<b>AND</b>	<b>Richard Matthews</b>	<b>SECOND DEFENDANT</b>

Application by the Original Plaintiff for the Plaintiffs to be substituted for the Original Plaintiff in the above action and for leave to amend the Order of Justice in order to give effect to this pursuant to Rules 6/10(9) and 6/12(1) of the Royal Court Rules, 1982, as amended.

Advocate A.R. Binnington for the Plaintiff.  
Advocate S. Slater for the First Defendant.  
Advocate R.J. Michel for the Second Defendant.

JUDGMENT

**JUDICIAL GREFFIER:** The Plaintiff commenced this action in April 1992 and it first came before the Royal Court on 1st May, 1992. When the Defendants filed their answers they pleaded that the relevant contracts had not been entered into with the Plaintiff but with Richard John Hammon Paine and Alan William Potter trading as Robertson Ward Associates. The original Plaintiff has now accepted this and accordingly brought this application. At the first hearing of this application on 27th August, 1992 it became clear that all the parties had overlooked the terms of Rule 6/10(9) of the Royal Court Rules. Rule 6/10(9) reads as follows:-

*"At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application -*

- (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
- (b) order any of the following persons to be added as a party, namely -
  - (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
  - (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

**but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as the Court may direct."**

To be fair to counsel, Rule 6/10(9) is rather unhelpfully tucked in at the end of the Rule on Third parties and can therefore be easily overlooked.

At the commencement of the hearing on 21st October, 1992, it became clear that the Defendants, who at the previous hearing had opposed the principle of substitution of one Plaintiff for another, now accepted that that was a proper procedure but that there still remained disagreement as to costs. The contention of the Defendants was that the original Plaintiff ought to pay all the costs up to the time of substitution, including the costs of this application, with the costs thereafter remaining in issue between the new Plaintiffs and the Defendants. The Plaintiffs on the other hand argued that the defence of the Defendants could be divided into two parts. The first part relating to the identity of the contracting party and therefore of the Plaintiff and the second part relating to lines of defence which would be arguable against either the original Plaintiff or a new Plaintiff. The Plaintiffs' advocate asked me to distinguish between these and effectively to leave the costs in relation to the second category in the cause.

In England, this area of procedure is dealt with under Order 15 Rule 6 and Order 15 Rule 6(2) and (4) are in almost identical terms to Rule 6/10(9).

I quote now from section 15/6/2 on page 198 of the 1993 White Book -

**"Adding or substituting plaintiffs - The tendency of modern practice is to allow the amendment where the defendant can be safeguarded as to costs, and the additional substitution is necessary to enable the question in issue to be determined".**

Section 15/6/15 on page 206 of the 1993 White Book reads as follows:-

**"Terms as to amendment of parties - On giving leave to amend as to parties, the Court may impose such terms as may be just having regard to all the circumstances.**

**Amendment is an indulgence, and the applicant will generally have to pay the costs of and occasioned by the amendment. But in cases of adding a plaintiff, the plaintiff may be ordered to bear all the costs of the action up to the time of the joinder of the added plaintiff. Thus in *Ayscough v. Bullar* (1889) 41 Ch. D.341, the terms were that if on the trial it appeared that the first plaintiff was not entitled to maintain the action, and that the added plaintiff was so entitled, the first plaintiff must pay the costs of the action up to the time of the joinder of the added plaintiff, and further that the added plaintiff should only be entitled to such relief as he could have claimed if the action had commenced at a time of his joinder as plaintiff. Similar terms were imposed in .....**"

Although the argument of the original Plaintiff that he ought not to be ordered to pay all the costs to the date of substitution appears initially to be attractive, such a decision would create enormous practical difficulties. Prior to the application for substitution the lawyers acting for the original Plaintiff will have been working for the original Plaintiff and so any costs recoverable for that period would have to be recovered for the benefit of the first Plaintiff. Similarly, the Defendants will have taken the decision to defend the action upon the basis that it was the original Plaintiff suing them and their decision might have been different if they had originally been sued by the substituted Plaintiff. Furthermore, any costs recoverable by the Defendants for that period would be recoverable from the original Plaintiffs. Advocate Binnington, acting for the original Plaintiff and for the new Plaintiff, asked me to treat the case in a similar way to an application to amend a pleading. However, there is in my view a very real difference here inasmuch that the actual parties are changing with a substituted Plaintiff. The only real manner in which I can effectively do justice between the parties on the matter of costs is to treat all matters prior to the order for substitution of the Plaintiffs as being between the

original Plaintiff and the Defendants and to treat all subsequent matters as being between the new Plaintiff on the one hand and the Defendants on the other hand.

In so doing I am following the principles set out in section 15/6/15 of the 1993 white Book. It seems to me that the position of the Defendants here is even stronger than in the Ayscough v. Bullar case inasmuch that the original Plaintiff is clearly conceding that he has no claim against the Defendant.

Although, it is conceivable that there would be exceptions to this general Rule, it does appear to me that the normal Order in such a case as this would be for the original Plaintiff to pay the costs to date including those of the application to substitute and of the amendment to the Order of Justice. However, in this case it is clear that because of the misunderstanding of the Rules by both parties; the first hearing and most of the preparation for this was entirely wasted and unnecessary. On the other hand, the original Plaintiff has effectively lost the argument today. It therefore appears to me that the correct Order in relation to costs is as follows:-

- (a) that the original Plaintiff be ordered to pay all the costs of the action to date including the costs of this application, with the exception only of the costs both in relation to the hearing on 27th August, 1992 and in relation to the preparation for that hearing; and
- (b) that no order be made in relation to costs excepted above.

Finally, in the future all costs in relation to this action will be in issue between the new Plaintiffs and the Defendants.

Authorities

Royal Court Rules, 1982, as amended: Rules 6/10(9); 6/12(1).

R.S.C. (1993 Ed'n): 15/6/2: p.198  
15/6/15: p.206.